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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

330 SOUTH FAIR OAKS AVENUE, LLC,

Plaintiff and Appellant,

v.

FRANCESCA DE LA FLOR et al.,

Defendants and Respondents.

B253991

(Los Angeles County  
Super. Ct. No. GC045468)

APPEAL from a postjudgment order of the Superior Court of Los Angeles County, William D. Stewart, Judge. Affirmed.

Carlson & Nicholas, Scott W. Carlson and Richard A. McDonald for Plaintiff and Appellant.

Marc Epstein, A Professional Corporation and Marc Epstein; Law Offices of Jeffrey B. Ellis and Jeffrey B. Ellis for Defendants and Respondents.

## I. INTRODUCTION

Plaintiff, 330 South Fair Oaks Avenue, LLC, appeals from a post-judgment order partially granting its attorney's fees incurred in securing a judgment. Plaintiff filed a complaint against defendants: Francesca De La Flor, Rene G. Van Sauter, Tatiana Van Sauter, Antiques Off Fair Oaks, LLC, Rio Delux Audio, LLC, and Oak Knoll Meadows Farm, Inc. Plaintiff prevailed on the merits against defendants for breach of a lease agreement and on fraudulent transfer theories. After judgment was entered against defendants, plaintiff moved for \$337,180 in attorney's fees pursuant to the lease agreement. In its motion, plaintiff sought attorney's fees for the time and efforts litigating fraudulent transfer issues. The trial court ruled plaintiff was not entitled to attorney's fees litigating the fraudulent transfer issue under Code of Civil Procedure section 1021. The trial court awarded plaintiff reduced attorney's fees in the amount of \$101,154.

Plaintiff contends the trial court erred. Plaintiff reasons that it was necessary to litigate the fraudulent transfer question in order to enforce its rights under the lease. We affirm the trial court's order.

## II. BACKGROUND

We previously discussed the underlying facts in this case. (*330 South Fair Oaks Avenue, LLC v. De La Flor* (May 18, 2015, B252280) [nonpub. opn.].) They need not be repeated here. After plaintiff obtained judgment against defendants, it moved for an award of attorney's fees. Plaintiff sought \$337,180 in attorney's fees pursuant to the lease agreement. Paragraph 31 of the lease agreement provides: "If any Party . . . brings an action or proceeding to enforce the terms herefor or declare rights hereunder, the Prevailing Party . . . in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees. . . . The term 'Prevailing Party' shall include, without limitation, a Party . . . who substantially obtains or defeats the relief sought, as the case

may be, whether by compromise, settlement, judgment, or the abandonment by the other Party . . . of its claim or defense. The attorneys' fee award shall not be computed in accordance with any court fee schedule, but shall be such as to fully reimburse all attorneys' fees reasonably incurred."

Plaintiff argued: "All of the attorneys' fees were incurred to in order to enforce the contract, i.e. to collect the rent owing under the Lease. In addition to establishing the breaches of Lease by Defendant de la Flor, and defeating her fabricated defenses. Plaintiff was required to expend considerable sums to establish and set aside the fraudulent transfers. This work involved extensive discovery to Defendants, discovery to third party lenders and other entities, numerous depositions, as well as obtaining expert testimony concerning the transactions." Plaintiff also relied on Code of Civil Procedure section 685.040.

Defendants contended plaintiff's fraudulent transfer causes of action are not encompassed under the lease agreement's attorney's fee provision. Defendants argued the fraudulent transfer causes of action were not to "enforce the terms" of the contract. Defendant maintained plaintiff's requested attorney's fees should be substantially reduced. The matter was submitted without any argument on October 25, 2013.

On December 4, 2013, the trial court issued its ruling. First, it found Code of Civil Procedure section 685.040 did not apply. Second, the trial court concluded that under Code of Civil Procedure section 1021, plaintiff could not recover attorney's fees as to the fraudulent transfer causes of action. The trial court ruled there would be no attorney's fees awarded for the portion of the work expended for the fraudulent transfer claims. The trial court ruled: "The court finds that not less than 30% of the work and labor on a time basis was attributable to the portion of preparation, discovery and trial of the claims for rents based upon the written lease. These issues involved the effect of the prior judgment, parking issues and reasonableness of the rates negotiated by the replacement tenant, as well as others. [¶] Accordingly, the court awards the sum of \$101,154.00 Attorney Fees."

### III. DISCUSSION

#### A. Plaintiff's Arguments

Plaintiff contends it should recover attorney's fees relating to the fraudulent transfer causes of action. First, plaintiff argues the fraudulent transfer causes of action were necessary to enforce the lease. Second, plaintiff contends the work establishing defendants' alter egos was recoverable under the contractual attorney's fee provision here. Third, plaintiff relies on Code of Civil Procedure section 685.040 as persuasive authority for awarding it attorney's fees on the fraudulent transfer causes of action.

#### B. Legal Standards

Generally, the normal standard of review for an award of attorney's fees is abuse of discretion. (*Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1319; *Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 887.) To the extent plaintiff challenges the apportionment of fees, the matter is reviewed for an abuse of discretion. (*Thompson Pacific Const., Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 555; *Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1083.) Insofar as plaintiff contends the trial court misconstrued the contractual attorney's fee provision, the appropriate standard of review for contract interpretation issues is de novo. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175; *Chinese Yellow Pages Co. v. Chinese Overseas Marketing Service Corp.* (2008) 170 Cal.App.4th 868, 879 (*Chinese Yellow Pages*); *Carver v. Chevron USA, Inc.* (2002) 97 Cal.App.4th 132, 142.) Our Supreme Court has held: "Under statutory rules of contract interpretation, the mutual intent of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,'

unless used by the parties in a technical sense or a special meaning is given to them by usage' (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.) Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning. [Citations.]" (*AIU Insurance Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-822; accord, *Santisas v. Goodin* (1998) 17 Cal.4th 599, 608.)

#### B. Plaintiff Cannot Recover Attorney's Fees for the Fraudulent Transfer Causes of Action Under Lease Agreement's Attorney's Fee Provision

Plaintiff contends that under the lease's attorney's fee provision, it can recover attorney's fees for the fraudulent transfer causes of action. As mentioned, a party who prevails can recover attorney's fees when it "brings an action or proceeding to enforce" the lease's terms. Plaintiff asserts that "to enforce the terms" of the lease agreement, the fraudulent transfer causes of action were required.

Claims under the Uniform Fraudulent Transfer Act, such as the causes of action at issue here, are considered torts. (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 837; see *Renda v. Nevarez* (2014) 223 Cal.App.4th 1231, 1240; *Fujifilm Corp. v. Yang* (2014) 223 Cal.App. 4th 326, 332.) The Courts of Appeal have held regarding the applicability of contractual attorney's fee provisions to tort claims, "[T]he sole question is the intent of the parties: did they intend to authorize the prevailing party to recover its attorney fees for a tort cause of action." (*Allstate Insurance Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1798; accord, *Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1076; *Lerner v. Ward* (1993) 13 Cal.App.4th 155, 160-161; *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342-1343.)

Defendants maintain the attorney's fee provision is limited solely to enforcing the terms of the lease. They rely on *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 702-709 (*Exxess, supra*) in support of their position. Exxess Electronixx, the cross-complainant, leased a portion of a building from Masco Building Products Corporation. (*Exxess, supra*, 64 Cal.App.4th at p. 702.) Heger Realty was the

broker for both parties. (*Ibid.*) The cross-complainant and Masco Building Products Corporation executed a lease agreement. (*Ibid.*) The lease agreement between the cross-complainant and Masco Building Products Corporation contained an attorney's fee provision. (*Ibid.*) The Court of Appeal explained: "Paragraph 31 of the lease provided: 'If any Party or Broker brings an action or proceeding to enforce the terms hereof or declare rights hereunder, the Prevailing Party (as hereafter defined) or Broker in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorney's fees . . . . The term "**Prevailing Party**" shall include, without limitation, a Party or Broker who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other Party or Broker of its claim or defense. . . .' (Boldface in original.)" (*Ibid.*) This attorney's fee provision is nearly identical to the one at issue here.

A dispute arose between cross-complainant and Masco Building Products Corporation regarding payment of bills under the lease. (*Exxess, supra*, 64 Cal.App.4th at p. 703.) The cross-complainant sued the cross-defendant, Heger Realty. The cross-complaint included claims for constructive fraud, declaratory relief and fiduciary duty breach. (*Id.* at p. 704.) Heger Realty, the cross-complainant and Masco Building Products Corporation all settled the case. (*Id.* at p. 704.) Heger Realty was a prevailing party against the cross-complainant in the settlement. (*Ibid.*) Heger Realty then moved for attorney's fees under the lease agreement. (*Id.* at p. 705.) The trial court granted Heger Realty's motion for attorney's fees, which the cross-complainant appealed. (*Ibid.*)

The Court of Appeal reversed. (*Exxess, supra*, 64 Cal.App.4th at p. 716.) The Court of Appeal discussed the cross-complainant's tort claims and whether the attorney fee provision was broad enough to support an award of attorney's fees to Heger Realty. (*Id.* at p. 708.) The Court of Appeal held: "We conclude that Exxess's claims for constructive fraud and breach of fiduciary duty were not brought to 'enforce the terms' of the lease. Civil Code section 1717, subdivision (a), makes clear that a tort claim does not 'enforce' a contract. That statute expressly refers to, and therefore governs, 'attorney's fees . . . which are incurred to enforce th[e] contract.' Because section 1717 does not

encompass tort claims (*Santisas v. Goodin, supra*, 17 Cal.4th at pp. 615, 617, 619; *Reynolds Metals Co. v. Alperson* [ (1979)] 25 Cal.3d [124,] 129), it follows that tort claims do not ‘enforce’ a contract.” (*Excess, supra*, at p. 709.)

Decisional authority does not support plaintiff’s construction of the attorney fee provision. Under narrow fee provisions which cover only actions “on the contract” or “to enforce the contract,” there can be no recovery for attorney’s fees on non-contract claims. (See *Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1160-1162 [fee provision limiting recovery of fees to those “incurred in enforcing or attempting to enforce any of the terms, covenants or conditions” did not provide recovery in tort actions]; *Excess, supra*, 64 Cal.App.4th at p. 709; *Xuereb v. Marcus & Millichap, Inc., supra*, 3 Cal.App.4th at pp. 1342-1343 [party cannot recover attorney’s fees on tort claims under a contractual provision authorizing fees incurred in an action to interpret or enforce the contract]; *De Mirjian v. Ideal Heating Corp.* (1949) 91 Cal.App.2d 905, 910 [lease provision authorizing attorney’s fee award in an action “to enforce Lessors’ rights hereunder” did not include tort claims].) Accordingly, the fee provision at issue here does not permit plaintiff to recover attorney’s fees incurred for its fraudulent transfer claims.

#### D. The Alter Ego Issue Was Unnecessary to Enforce the Terms of the Contract

Plaintiff argues: the work done to establish defendants’ alter egos was an issue necessary to enforce the lease’s terms; the alter ego issue was a major part of the fraudulent transfer causes of action; and because the alter ego work was necessary, the trial court should have awarded all the incurred fees for fraudulent transfer-related issues. As noted, because plaintiff is challenging the apportionment of the attorney’s fees, we review for an abuse of discretion. (*Thompson Pacific Const., Inc. v. City of Sunnyvale, supra*, 155 Cal.App.4th at p. 555; *Erickson v. R.E.M. Concepts, Inc., supra*, 126 Cal.App.4th at 1083.)

Plaintiff relies on *Reynolds Metals Co. v. Alperson*, *supra*, at pages 127-129 (*Reynolds Metals Co.*). In *Reynolds Metals Co.*, the defendants were shareholders and directors of Titanium Metallurgical, Incorporated. Titanium Metallurgical, Incorporated owned and operated a subsidiary, Turner Metals Supply, Incorporated. (*Id.* at p. 127.) The plaintiff supplied aluminum goods and products to Turner Metals Supply, Incorporated under a general line consignment agreement. (*Ibid.*) Turner Metals Supply, Incorporated, with Titanium Metallurgical, Incorporated as the endorser, executed and delivered two promissory notes. (*Ibid.*) The notes provided for recovery of collection costs, including limited attorney's fees, in the event of default. (*Ibid.*) Turner Metals Supply, Incorporated and Titanium Metallurgical, Incorporated commenced bankruptcy proceedings. (*Ibid.*) The plaintiff, having extended Turner Metals Supply, Incorporated hundreds of thousands of dollars in credit, filed a creditor's claim. (*Ibid.*) The plaintiff also brought a suit seeking to hold the defendants personally liable for the debts owed. The plaintiff claimed the defendants were "alter egos" of the two bankrupt companies. (*Ibid.*) After a lengthy trial, the trial court rejected the "alter ego" theory, absolved the defendants from personal liability and granted them attorney's fees. (*Ibid.*)

Our Supreme Court held: "Had plaintiff prevailed on its cause of action claiming defendants were in fact the alter egos of the corporation [citation], defendants would have been liable on the notes. Since they would have been liable for attorney's fees pursuant to the fees provision had plaintiff prevailed, they may recover attorney's fees pursuant to [Civil Code] section 1717 now that they have prevailed." (*Reynolds Metals Co.*, *supra*, 25 Cal.3d at p. 129.) Our Supreme Court further discussed the attorney's fees awarded: "Where a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under [Civil Code] section 1717 only as they relate to the contract action. [Citations.] . . . In this case, the two promissory notes contained contract provision for attorney's fees, but no such provision existed in the general line consignment agreement. Accordingly, attorney's fees incurred solely for defending causes of action based on the latter agreement and defending against the tort causes of action are not recoverable. [¶]



Conversely, plaintiff's joinder of causes of action should not dilute its right to attorney's fees. Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed. All expenses incurred with respect to the alter ego issue—common to both the note and the general line consignment agreement—qualify for award.” (*Id.* at pp. 129-130.) Courts of Appeal have likewise found fees need not be apportioned if counsel's services relate to an issue common to both causes of action. (*Erickson v. R.E.M. Concepts, Inc.*, *supra*, 126 Cal.App.4th at p. 1083; *Wilshire Westwood Assocs. v. Atlantic Richfield Co.* (1993) 20 Cal.App.4th 732, 747.)

Here, the trial court did not find the time and effort expended litigating the alter ego issues necessary to establish Ms. De La Flor's contract breach. To prevail on a contract breach claim, a plaintiff needs to demonstrate: the existence of a contract; the performance under the contract's terms; the defendant's breach; and the breach caused damages. (*Stockton Mortgage, Inc. v. Trope* (2014) 233 Cal.App.4th 437, 447; *Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913.) Here, plaintiff established: Ms. De La Flor and plaintiff had an existing lease agreement; Ms. De La Flor breached the lease by failing to pay rent and vacating the premises prior to the lease's expiration; it performed all of the terms and conditions under the lease; and Ms. De La Flor's breach caused damages. Plaintiff cites to no part of the record which required that it rely on Ms. De La Flor's alter egos in order to prevail on its contract breach claim. The trial court did not abuse its discretion by apportioning 30 percent of plaintiff's requested attorney's fees to the contract breach and awarding no fees for the fraudulent transfer claims.

#### E. Code of Civil Procedure Section 685.040 is Irrelevant

Plaintiff argues Code of Civil Procedure section 685.040 is persuasive authority supporting a full award of attorney's fees. Code of Civil Procedure section 685.040 states: “The judgment creditor is entitled to the reasonable and necessary costs of

enforcing a judgment. Attorney's fees incurred in enforcing a judgment are not included in costs collectible under this title unless otherwise provided by law. Attorney's fees incurred in enforcing a judgment are included as costs collectible under this title if the underlying judgment includes an award of attorney's fees to the judgment creditor pursuant to subparagraph (A) of paragraph (10) of subdivision (a) of Section 1033.5.” We discussed the legislative history of Code of Civil Procedure section 685.040 in *Chinese Yellow Pages*, *supra*, 170 Cal.App.4th at page 881: “In response to the *Chelios* [v. *Kaye* (1990) 219 Cal.App.3d 75, 80] opinion, the Legislature in 1992 adopted the third sentence in the current provision of [Code of Civil Procedure] section 685.040, which provides for a postjudgment attorney fees award under specified circumstances. [Citation.] The express purpose of the 1992 amendment to [Code of Civil Procedure] section 685.040 was to provide for postjudgment attorney fees incurred in enforcing the judgment, thus abrogating the *Chelios* holding, which deprived a creditor of fees incurred in state and federal courts. [Citations.] Based on the foregoing, we conclude [Code of Civil Procedure] section 685.040 can permit the recovery of reasonable and necessary attorney fees and costs incurred in enforcing a judgment. The express language of [Code of Civil Procedure] section 685.040 extends to legal expenses incurred in the enforcement of a judgment.” By its own terms, Code of Civil Procedure section 685.040 does not apply to attorney's fees incurred in securing a judgment. Code of Civil Procedure section 685.040 applies to post-judgment efforts to enforce a judgment.

Plaintiff does not contend Code of Civil Procedure section 685.040 controls the outcome of this case. However, plaintiff asserts that treating the attorney's fees to set aside fraudulent transfer differently solely based on the timing of the work performed creates an inefficient and bizarre result. Plaintiff contends there should be no difference between recovering attorney's fees for fraudulent transfer to enforce an existing judgment and the pre-judgment attorney's fees incurred here. We disagree. Under the American rule of attorney's fees, which California follows, each party ordinarily pays his or her own fees. (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 516; *Baker Botts LLP v. Asarco LLC* (2015) 576 U.S. \_\_\_, \_\_\_ [2015 WL 247336, \*4].) The exception to this rule is when

attorney's fees are allowed as costs to the prevailing party when authorized by contract, statute or law. (Code of Civ. Proc., § 1033.5, subd. (a)(10); *Grayl CPB, LLC v. SCC Acquisitions, Inc.* (2015) 233 Cal.App.4th 882, 889-890.) Plaintiff has identified no contract, statute or law which authorizes an award of attorney's fees incurred for the fraudulent transfer causes of action here. Code of Civil Procedure section 685.040 has nothing to do with this case.

#### IV. DISPOSITION

The attorney's fees award is affirmed. Defendants, Francesca De La Flor, Rene G. Van Sauter, Tatiana Van Sauter, Antiques Off Fair Oaks, LLC, Rio Delux Audio, LLC, and Oak Knoll Meadows Farm, Inc. may recover their appeal costs from plaintiff, 330 South Fair Oaks Avenue, LLC.

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TURNER, P. J.

We concur:

KRIEGLER, J.

MOSK, J., Concurring

I concur.

The parties agree that the attorney fees clause could in theory cover services to enforce the agreement as against alter egos. They disagree over whether any such fees could be allocated in this case. There is no indication that any significant amount of attorney fees should be allocated to alter ego claims apart from the other claims. I agree with the affirmance.

MOSK, J.